IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-144

GONZALO FERNOS-LOPEZ,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

FOR THE FIRST CIRCUIT

Petitioner Gonzalo Fernos-Lopez respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit in this case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, dated June 14, 1979, is reported in 599 F.2d 1087. It is set out in Appendix A, infra. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1979. A timely petition for rehearing was denied on July 20, 1979. On August 14, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari until September 18, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the invalidity of a bankruptcy referee's order to erase immediately a tape recording of a terminated, unrecorded bankruptcy proceeding can be asserted as a defense to a contempt charge when there was no opportunity for review of the order and compliance with it would have caused irreparable harm.

2. Whether the Due Process Clause of the Fifth Amendment and the First Amendment to the United States Constitution invalidate a bankruptcy referee's order, after the end of an otherwise unrecorded proceeding, to erase a tape recording, when recording was not proscribed by law, rule, order or practice and when no notice had been given that recording was prohibited.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

2. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

3. Rule 511 of the Rules of Bankruptcy Procedure is set forth in Appendix G, infra.

4. 11 U.S.C. § 69 is set forth in Appendix C, infra.

5. Rule 920 of the Rules of Bankruptcy Procedure is set forth in Appendix D, infra.

STATEMENT OF THE CASE

On January 31, 1977, petitioner Gonzalo Fernos-Lopez, a creditor in a bankruptcy proceeding, attended a hearing before Bankruptcy Referee Antonio I. Hernandez-Rodriguez in the Bankruptcy Court of San Juan, Puerto Rico. No recording equipment was in use and no court reporter was employed for this hearing. No sign indicated that recording was not allowed and no court rule forbade the operation of sound recorders by participants or others in bankruptcy proceedings. Because he desired to maintain an accurate record of the proceedings for his own use, petitioner set up his own cassette tape recorder on the table next to the desk of the bankruptcy referee and recorded the entire proceeding.

After the conclusion of the hearing another participant told the referee that petitioner had recorded

the hearing. The referee asked petitioner whether he had obtained permission to record the proceedings. Petitioner said that he had not. The referee then ordered petitioner to erase the tape. Petitioner refused. The referee repeated the order in the presence of two marshals and was met with the same refusal. The referee then ordered one of the marshals to take possession of the tape and tape recorder. In the belief that the marshal would erase the tape, petitioner delivered the tape recorder but not the tape to the marshal.*

The two marshals then took petitioner out of the courtroom and into

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*The opinion of the Court of Appeals refers at several places to petitioner's having been ordered to erase or relinquish the tape. See 599 F.2d at 1092-93, App. A, infra, at 7-9. Nothing in the trial transcript supports the position that petitioner was ordered to relinquish the tape. Neither the Order of Contempt, App. E, infra, nor the Certificate of Facts, App. F, infra, states that petitioner was ever ordered to do anything but erase the tape.

a room whose door bore a sign "Prisoners only." They kept him there for a short period of time and then returned with him to the courtroom. The referee then asked petitioner whether he was willing to erase the tape. Petitioner refused and the referee declared petitioner guilty of contempt of court and imposed a fine of $250. In order to preserve his right to appeal, petitioner stated that he would not pay the fine. During the entire incident petitioner remained calm, did not engage in disruptive behavior, and showed no disrespect to the court beyond his refusal to comply with the order.

On the same day the bankruptcy referee set forth a summary of these facts except for petitioner's statement that he would not pay the fine, and entered his contempt citation in written form into the record. See Order of Contempt, App. E, infra. On February 8, 1977, the same referee submitted a Certificate of Facts to the Chief Judge of the United States District

of Puerto Rico, adding only that petitioner stated he would not pay the fine. See Certificate of Facts, App. F, infra. An Order to Show Cause was issued on February 17, 1977.

Petitioner appeared pro se at the trial held on April 26, 27, and 28, 1977. Despite petitioner's attempts to present evidence, to argue, and to have the court instruct the jury that the underlying order was invalid, the trial judge ruled and instructed the jury that the invalidity of a court order is not a defense in a criminal contempt proceeding based on a failure to obey the order. He also instructed the jury as a matter of law that an order to erase the tape recording was a valid and lawful order. The jury returned a verdict of guilty. Petitioner was later given a three months suspended jail sentence, fined $2000 plus costs, and placed on two years probation. Upon learning that a sentence both of incarceration and of fine is not permissible under the applicable statute,

the trial judge later resentenced petitioner to a $2000 fine plus costs.

DISPOSITION OF THE CASE ON APPEAL

Conducting his appeal pro se, petitioner argued inter alia 1) that the referee's order was not a lawful order and that he could defend the contempt action on that basis; 2) that the bankruptcy court and the district court erred in considering petitioner's stated refusal to pay the fine a contemptuous act; 3) that the district court violated petitioner's constitutional right to be free from double jeopardy by holding a trial on a matter already adjudged by the bankruptcy referee.

Refusing to rule on the substantive legal bases of petitioner's appeal, the Court of Appeals addressed only the procedural question whether petioner's action warranted summary contempt or required notice and hearing prior to judgment of contempt. 599 F.2d at 1091,

App. A, infra, at 4. The Court found that neither the tape recording itself nor petitioner's refusal to erase the tape recording posed an imminent threat to the administration of justice. Therefore, the referee improperly employed summary contempt. Id. at 1093, App. A, infra, at 9. It was error to impose a fine without first providing petitioner with notice and hearing. Id. Because the trial jury might have been influenced in its verdict by petitioner's refusal to pay the fine, the error of not providing notice and hearing was not cured by the trial. Id., App. A, infra, at 10. The Court of Appeals vacated the judgment of conviction and remanded to the District Court for proceedings consistent with its opinion. Id.

Petitioner petitioned the Court of Appeals for rehearing, arguing several of the errors raised here and contending that its failure to reach the merits subjected him to the needless expense and ordeal of retrial. The Court of Appeals denied the petition for rehearing without opinion. App. B, infra.

WHY THE COURT SHOULD GRANT THE WRIT

This case presents important questions regarding the rule requiring compliance with invalid court orders and the right of a party by means of a tape recording to preserve evidence of a bankruptcy hearing not otherwise recorded. Because the Court of Appeals decided this case in such a way that on remand the District Court is constrained to rule on these questions in a manner in violation of the Constitution, this petition is not tantamount to an interlocutory appeal. To deny the writ, therefore, will leave in force appellate court rulings inconsistent with the Constitution and prior decisions of this Court. A denial will also subject petitioner to the expense and inconvenience of an unnecessary trial or hearing whose outcome will be governed by those appellate court rulings.

1. BECAUSE A CONTRARY RULING IS INCONSISTENT WITH DUE PROCESS OF LAW THE COURT MUST MAKE CLEAR THAT A CONVICTION FOR CRIMINAL CONTEMPT WILL NOT STAND WHEN A PERSON REFUSES TO COMPLY WITH AN INVALID JUDICIAL ORDER REQUIRING AFFIRMATIVE ACTION THAT WILL BOTH CHANGE THE STATUS QUO AND CAUSE IRREPARABLE INJURY AND FROM WHICH THERE IS NO OPPORTUNITY FOR EFFECTIVE REVIEW BEFORE VIOLATION.

The Court has repeatedly reaffirmed the general rule that all orders and judgments of courts must be complied with promptly. Maness v. Meyers, 419 U.S. 449, 458, 95 S.Ct. 584, 591 (1975); United States v. United Mine Workers of America, 330 U.S. 258, 293-94, 67 S.Ct. 677, 696 (1947); Howat v. Kansas, 258 U.S. 181, 189-90, 42 S.Ct. 277, 280-81 (1922). A criminal contempt conviction will be upheld despite a later judicial determination that the underlying order was invalid. 330 U.S. at 294, 67 S.Ct. at 696.

In United States v. Ryan, 402 U.S.

530, 91 S.Ct. 1580 (1971), the Court reasserted the longstanding exception that a conviction for criminal contempt incurred in order to obtain review of an otherwise nonappealable order will be vacated if the alleged contemnor succeeds in proving on appeal that the underlying order was invalid. 402 U.S. at 532-33, 91 S.Ct. at 1582.

In Maness v. Meyers the Court added the dimension of irreparable injury to the Ryan contempt-for-purposes-of-review exception. 419 U.S. at 460-63, 95 S.Ct. at 592-94. The Court overturned the criminal contempt conviction of an attorney for advising his client in good faith to assert his Fifth Amendment privilege not to testify. Id. at 458, 95 S.Ct. at 591. The central point of the Court's holding was that an exception to the general rule is justified because compliance could cause an injury that subsequent appellate vindication might be unable to repair. Id. at 460, 95 S.Ct. at 592.

Maness v. Meyers is commonly cited in contempt matters, however, for its introductory statement of the general rule rather than for the articulation of the exception to that rule that constitutes its holding. See, e.g., United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976); Lewis v. Baune, 534 F.2d 1115 (5th Cir. 1976); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976).

The opinion of the Court of Appeals in this case illustrates how badly some lower courts have misperceived situations that come within the scope of the Ryan/Maness exception. The facts of this case reveal an order that, if obeyed, would have produced irreparable injury and from which no effective opportunity for appeal existed.*

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*Petitioner had no real chance to move the bankruptcy referee to stay the order pending appeal. There is no evidence that petitioner was remotely aware of this possibility; nor should it be expected that a layperson know how to

In remarking on petitioner's contentions in this regard, however, the First Circuit quoted only the introductory section of Maness that states the general rule that all orders must be complied with promptly. 599 F.2d at 1091, App. A, infra, at 5. In response to petitioner's argument that the order was invalid the Court of Appeals stated that the order was clearly within the bankruptcy court's jurisdiction. Id., App. A, infra, at 5. Therefore, "the interests of orderly government demand that the court's orders be respected and obeyed." Id., App. A,

(continuation from previous page)

make such a motion. In any event, a motion to stay the order would have been hopeless because of the immediacy of the referee's demand. Petitioner believed the only way he could obtain appellate review of the order would be to disobey it. See App. L4, infra. Given the practical circumstances, he was no doubt correct in this belief.

infra, at 5 (citing United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947)). Thus, the Court of Appeals, in complete agreement with the trial court's jury instructions, see App. L6, infra, refused to recognize any of the factors (irreparable injury, lack of opportunity for effective appeal, preservation of status quo through disobedience) that bring petitioner's action within the scope of the Ryan/Maness exception.

While the Court of Appeals correctly held that summary contempt was improper in this case, it failed to follow through on the logic of that finding to its implications for the substance of the contempt charge itself. The power to hold a person in contempt summarily is an extraordinary power given in order to enforce immediate compliance with orders designed to prevent disorder in the course of judicial proceedings. See, e.g., Sacher v. United States, 343 U.S. 1, 9, 72 S.Ct. 451, 455 (1952); Cooke v. United States, 267 U.S. 517,

534, 45 S.Ct. 390, 394 (1925). And it has long been the rule that the limits of the power to punish for contempt are "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231, 5 L.Ed. 242, 248 (1821). If summary contempt was improper, that is true only because immediate compliance with the order was not necessary to prevent disruption of a judicial proceeding. But if immediate compliance was not necessary, then it is improper even at a later hearing (or on appeal) to rule that the failure to comply immediately was contemptuous regardless of the order's unlawfulness when there was no means of review before compliance worked irreparable harm.

Had the bankruptcy court not required immediate compliance and had it given petitioner written notice and a hearing at a later date, petitioner could have appealed the validity of the order to another court before being found in violation of it and orderly processes could have been preserved.

Petitioner would not have been forced to determine the validity of the order himself before deciding whether to comply and the bankruptcy referee could have achieved everything he was entitled to achieve. Had the Court of Appeals followed the logic of its finding that summary contempt was improper, therefore, it would have ruled that no contempt is present when a court improperly orders immediate compliance and thereby destroys all opportunity for effective review of the validity of the order.

The dignity and authority of the court do not exist in the abstract or as ends in themselves. Rather, they are means to the end of justice. Ordering a participant in a bankruptcy proceeding to erase immediately a tape recording of the already concluded proceedings serves no discernible purpose in the administration of justice.* And up-

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*This is especially true given both the Federal and Commonwealth of Puerto Rico policies that encourage tape recordings of judicial proceedings. See

holding the punishment of one who demonstrates the invalidity of an order, obedience to which would have caused irreparable damage, seems more likely to spawn contempt rather than respect for the judicial system. See Walker v. City of Birmingham, 388 U.S. 307, 330-31, 87 S.Ct. 1824, 1837 (1967) (Warren, C.J., dissenting) (such gross misuse of judicial process not likely to lead to greater respect for the law).

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the discussion in section 2 of this petition, infra p. 19.

2. THE COURT SHOULD FIND THAT THE UNDERLYING ORDER TO ERASE THE TAPE RECORDING IS INVALID BECAUSE IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY REQUIRING THE DESTRUCTION OF THE BEST MEANS AVAILABLE TO PETITIONER FOR ACQUIRING A REPORT UPON WHICH TO BASE ANY APPEAL FROM THE BANKRUPTCY PROCEEDING ITSELF.

The policy within the Commonwealth of Puerto Rico consistently encourages the use of sound recordings of proceedings by parties for their own use. See P.R. Laws Ann., title 32 § 1301, App. H, infra (Use of Tape Recorders) (use of tape recorders in all proceedings within purview of Superior Court authorized); New Canons of Judicial Ethics of Puerto Rico, Canon XVIII, App. J, infra (sets

forth restrictions on use of photography, radio, film, television, and recording by those not directly involved in proceedings; "prohibitions in this canon shall not be applied . . . to the use of tape recorders or similar equipment by counsel for the parties."); Circular Letter No. 1 from the Administrative Director of the Courts of Puerto Rico to the Honorable Judges of the Court of First Instance, July 23, 1975, App. K, infra (administrative policy established that in all courtrooms judges shall allow attorneys who represent parties, or parties represented in own right, to use their own tape recorders during the proceedings). It can scarcely be maintained, therefore, that a policy against sound recordings within Puerto Rico misled the bankruptcy referee into thinking that they were properly excluded from his court.

No court rule either in the District Court or in the Bankruptcy Court prohibited

the use of tape recorders by parties to proceedings. No sign or other communication indicated that recording was not permitted or that prior permission had to be obtained. In fact, it was common for attorneys to record bankruptcy proceedings in that court. See App. L1, infra. And the referee admitted at trial that he would have permitted the recording if petitioner had requested prior permission. Id.

In order to take an appeal from the bankruptcy proceeding itself petitioner normally would be required to include in the record a transcript of such parts of the proceeding as he deems necessary for inclusion in the record, or, if he intends to urge that a finding or conclusion is unsupported by the record, he must include a transcript of all evidence relevant to such a finding or conclusion. Fed. R. App. P. 10(b). In cases, such as this bankruptcy proceeding, in which no report of the evidence was made and

no transcript from an official reporter was made, however, the rules provide that "the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection." Fed. R. App. P. 10(c). Sound recordings are a better means from which to prepare a statement of the evidence than either the participants' recollections or their handwritten notes. Prior to this incident petitioner had experienced occasions in which his recollection of the proceedings differed significantly from that of this partiuclar bankruptcy referee. He stated at trial that his desire to protect himself against such divergent recollections was a major reason for using the tape recorder. Compliance with the order to erase the tape would have deprived not only petitioner but all other participants in a potential appeal, including the Court of Appeals itself, of the best available means for preparing a statement of the evidence.

Compliance with the order, therefore, would have hampered petitioner's ability to pursue an effective appeal. The Court has held that due process of itself does not guarantee an absolute right to appeal. See, e.g., Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038 (1977); Ross v. Moffit, 417 U.S. 600, 611, 94 S.Ct. 2437, 2444 (1974); Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956). If an appeal is allowed as a matter of right, however, it is elementary that the procedures for taking that appeal must be consistent with due process. See, e.g., 351 U.S. at 18, 76 S.Ct. at 590. Presumably the Federal Rules of Appellate Procedure are designed to further due process. Thus, any interference with a means for taking an appeal that has been provided by rules designed to comport with and to protect the Fifth Amendment right to due process violates that right to due process itself. Because the referee's order, if carried out, would have interfered with petitioner's means for

taking an appeal from the bankruptcy hearing, it violated petitioner's Fifth Amendment right to due process.*

3. THE COURT SHOULD MAKE CLEAR THAT THE UNDERLYING ORDER IS INVALID BECAUSE IT VIOLATES PETITIONER'S FIRST AMENDMENT RIGHT TO MAINTAIN A RECORD OF WHAT HE HAS A RIGHT TO HEAR.

The Court has consistently held that where a proceeding is open to the public and not declared secret, there is a First Amendment right to report what transpires there. See, e.g., Smith v. Daily Mail Publishing Co., ___ U.S. ___, 99 S.Ct. 2667, 2671 (1979)

*Compliance with the referee's order would have had the destruction of evidence of the proceeding as its result. Issuance of the order, therefore, can be viewed as an attempted obstruction of justice. From that perspective the order was both illegal and invalid.

(if information is lawfully obtained, state may not punish its publication except when necessary to further the highest form of state interest); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 310, 97 S.Ct. 1045, 1046 (1977) (per curiam) (first and fourteenth amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings open to public); Nebraska Press Assn. v. Stuart, 427 U.S. 539, 568, 96 S.Ct. 2791, 2807 (1976) (order prohibiting the reporting of evidence adduced at open preliminary hearing plainly violated settled principles); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491, 95 S.Ct. 1029, 1044 (1975) (state may not impose sanctions on accurate publication of name of rape victim obtained from judicial records maintained in public prosecution and open to public inspection); Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522 (1966) (nothing proscribes press from reporting events that transpire in courtroom); Craig

v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947) (those who see and hear what transpired in courtroom can report it with impunity); see also Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 216-17 ("the right to privacy is not invaded by any publication made in a court of justice . . . and (at least in many jurisdictions reports of [proceedings in actions for libel or slander] would in some measure be accorded a like privilege.").

It follows from the right to report that, unless forbidden by rule or prior court order, one has a right to make exact records to help insure an accurate report. See, e.g. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492, 95 S.Ct. 1029, 1045 (1975) (special protected nature of accurate reports of judicial proceedings has repeatedly been recognized); Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947) ("If a transcript of the court proceedings

had been published, we suppose none would claim that the judge could punish the publisher for contempt. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."); see also Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522 (1966); Estes v. Texas, 381 U.S. 532, 541-42, 85 S.Ct. 1628, 1632 (1965); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1946); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941).

It would be anomalous to accord to the public at large a right at a judicial proceeding not enjoyed by the parties themselves. Because the First Amendment protects the rights of the press to maintain accurate records and to publish what transpires there, the parties immediately affected have that right as well. Thus, absent a court rule prohibiting recordings for personal

use by parties to court proceedings, petitioner had a First Amendment right to record the bankruptcy hearing.*

CONCLUSION

The writ should issue to review that part of the judgment below failing to reach and invalidate the tape erasure order and to preclude retrial.

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*Petitioner does not maintain that he had a right to broadcast or otherwise make public the electronic sound recording itself. Rather, he contends solely that, as a party to the proceeding, and in view of the fact that he was not told by statute, rule, practice, or order not to do so, he had a right to record the proceeding and to keep that recording for his own personal use.

Respectfully submitted,

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September 1979

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Appendix A

United States Court of Appeals
For the First Circuit

No. 77-1331

GONZALO FERNOS-LOPEZ,

PETITIONER-APPELLANT,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, et al.,

RESPONDENTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[HON. JUAN R. TORRUELLA, *U.S. District Judge*]

Before CAMPBELL, *Circuit Judge*
BOWNES, *Circuit Judge*
JAMESON, *Senior District Judge.**

Gonzalo Fernos-Lopez, appellant, pro se.
Alberto Tellechea, Assistant United States Attorney, with whom *Julio Morales Sanchez*, United States Attorney, was on brief, for appellees.

June 14, 1979

PER CURIAM. Gonzalo Fernos-Lopez has appealed from his conviction of criminal contempt for failure to obey the orders of a bankruptcy court judge. The bankruptcy judge had found appellant in contempt for refusing to obey orders to erase or relinquish a tape cassette recording of proceedings at a creditors meeting made without the court's permission. Appellant was fined $250, which he refused to pay. These facts were certified by the bankruptcy judge to the

* Of the District of Montana, sitting by designation.

district court. After a jury trial, appellant was found guilty. He was given a three month suspended sentence, placed on probation for two years, fined $2,000, and ordered to reimburse the Government for all expenses incurred in the proceedings.[1]

Proceedings before Bankruptcy Judge

Appellant appeared *pro se* at the bankruptcy proceedings as a creditor of the bankrupt to file a claim for unpaid rent, property taxes and administrative expenses which he claimed were owed to him as landlord of the bankrupt's business. Appellant had requested the hearing to determine whether he was entitled to certain funds in an escrow account with the trustee.

The bankruptcy court did not at that time record its proceedings. Appellant decided to record the proceedings for his own use. His portable tape recorder was placed on a bench in the court room and set in operation at the beginning of the proceedings. Near the end of the proceedings either the trustee or an attorney for one of the other creditors informed the judge that appellant was tape recording the proceedings.

The bankruptcy judge asked appellant whether he had permission from the court to record the proceedings. When appellant replied that he did not have permission, the judge ordered him to erase the recording. Appellant refused. A deputy United States marshal was then ordered to take possession of the recorder and the cassette. Appellant delivered the recorder but refused to give up the cassette. The judge had appellant taken from the courtroom by two deputy marshals. He was brought back a few minutes later and again refused to erase the recording or give up the cassette. He was then declared guilty of civil

[1] Later appellant was resentenced and the provisions for suspended sentence and probation were eliminated.

and criminal contempt, pursuant to 11 U.S.C. § 69.[2] He was fined $250, the maximum penalty a bankruptcy judge can impose. Appellant said, "Your honor, I am not going to pay that fine." The court then told appellant that he could leave, and that the incident would be certified to the district court.

There is no evidence that appellant was loud, vulgar, disruptive, or disrespectful of the court, except for his stated refusal to comply with the court's orders.

Proceedings in District Court

The facts were certified to the United States District Court by the bankruptcy judge. The district judge found that the certification was in accordance with Rule 920(a)(4) of the Rules of Bankruptcy Procedure, Rule 42(b) of the Federal Rules of Criminal Procedure, and 18 U.S.C. § 401(3). Appellant was ordered to appear before a United States Magistrate to show cause why he should not be found guilty of criminal contempt. Appellant appeared before the magistrate and entered a plea of not guilty.

As appellant notes in his brief, he "literally flooded the Court with Motions". He requested permission to appear *pro se* at his trial. On the Government's motion psychiatric

[2] 11 U.S.C. § 69 provides in pertinent part:

> (a) A person shall not, in proceedings before a referee [now bankruptcy judge] (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined accordingly to law . . .
>
> (b) The referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. . . .

examination of appellant was ordered by the court. Appellant was found to be competent to represent himself. Stand-by counsel was appointed to aid appellant with his defense.

The trial lasted three days. Appellant was found guilty of criminal contempt of the bankruptcy court. Two citations for contempt of the district court were quashed at the end of the trial. As noted *supra,* appellant was sentenced to three months imprisonment, which was suspended, placed on probation for two years, fined $2,000 and ordered to pay the Government's court costs amounting to $2,138.45. Appellant had spent more than four months on probation when he was resentenced and the imprisonment and probation were eliminated. Payment of the fine and costs were stayed pending appeal.

Contentions on Appeal

Appellant continues to represent himself on this appeal. He has filed an extensive brief, raising numerous issues involving the various stages of the protracted proceedings. Only one of the issues—the procedure followed by the bankruptcy court in finding appellant guilty of criminal contempt—will be addressed in this opinion.

Contempt of Bankruptcy Court

The power of a court to punish for contempt is inherent and essential to the administration of justice. "So far as the inferior courts are concerned", however, that power may, within limits, be regulated by Congress. *Michaelson* v. *United States,* 266 U.S. 42, 65-67 (1924). It was early recognized that bankruptcy courts are vested with the contempt power. *Boyd* v. *Glucklich,* 116 F. 131, 135 (8 Cir. 1902). See Advisory Committee's Note, Bankruptcy Rule 920. The bankruptcy code and rules provide for punishment of contemptuous conduct which occurs in bankruptcy proceedings.

The basis for contempt power in the courts was set forth in *Maness* v. *Meyers,* 419 U.S. 449, 458 (1974):

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Disobeying or resisting any lawful order of a bankruptcy judge is contemptuous conduct. 11 U.S.C. § 69(a). Appellant argues that the judge's order was not lawful because tape recording of bankruptcy proceedings is allowed. The order, however, was clearly within the court's jurisdiction. If the court has jurisdiction over the person and the subject matter, the interests of orderly government demand that the court's orders be respected and obeyed. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 303 (1947). The invalidity of a court order is not generally a defense in a criminal contempt proceeding alleging its disobedience. *United States* v. *Seale,* 461 F.2d 345, 361-62 (7 Cir. 1972) and cases there cited. We need not consider appellant's contention that his conduct was not contemptuous. His refusal to obey the court's orders is undisputed.

Bankruptcy Court Contempt Procedure

We turn now to the crucial issue on this appeal—whether the procedure followed by the bankruptcy judge requires a reversal of appellant's conviction. Bankruptcy Rule 920 prescribes the procedure to be followed for contempt committed in proceedings before a referee.[3] 920(a)(1) provides

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[3] The bankruptcy contempt statute and rule refer to a referee. 11 U.S.C. § 69; Bankruptcy Rule 920. The bankruptcy code has been amended to change the nomenclature; a referee is now properly referred to as a judge. See 28 U.S.C. § 151, *et seq.* in 11 U.S.C.A., Revised Bankruptcy Act as approved November 8, 1978.

that misbehavior prohibited by § 69(a)(2) may be "punished summarily". Under § 69(a)(2) a "person shall not . . . misbehave during a hearing or so near the place as to obstruct the same". 920(a)(2) reads in pertinent part:

> *Disposition by Referee upon Notice and Hearing.* Any other conduct prohibited by section 69(a) of this title may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both.

920(a)(3) provides that a referee may not impose a fine of more than $250, and (a)(4) provides that if it appears to the referee that prohibited conduct would warrant imprisonment or a fine in excess of $250, he may certify the facts to the district judge.

There is a clear and well recognized distinction between misbehavior which obstructs a hearing, § 69(a)(2), which may be summarily punished, Rule 920(a)(1), and disobeying or resisting a lawful order, § 69(a)(1), which may be punished only after a hearing on notice, Rule 920(a)(2).

11 U.S.C. § 69 follows substantially the general contempt statute. 18 U.S.C. § 401, and Bankruptcy Rule 920 follows Rule 42 of the Federal Rules of Criminal Procedure. See Advisory Committee's Note, Bankruptcy Rule 920. In construing § 401 and Rule 42 the cases have uniformly held that misbehavior which obstructs the hearing and permits summary action must present an imminent threat to the administration of justice. It must "immediately imperil" the judge in the performance of his judicial duty. *In re Little*, 404 U.S. 553, 555 (1972). Where there is no physical disorder in the courtroom, no laughing, shouts or abusive

language, and no significant delay in the proceedings, obstruction of justice is not shown. *United States ex rel. Robson* v. *Oliver*, 470 F.2d 10, 14 (7 Cir. 1972).

The statutory procedure has constitutional due process overtones. Summary procedure is always regarded with disfavor. *Sacher* v. *United States*, 343 U.S. 1, 8 (1952). Reasonable notice of a charge and an opportunity to be heard in defense before punishment is basic to our system of jurisprudence. Matters offered in explanation or mitigation may lessen the judgment or avoid punishment altogether. *Groppi* v. *Leslie*, 404 U.S. 496, 502-503 (1972) and cases cited therein.[4] Reasonable notice of the charge and an opportunity to be heard before punishment is imposed are essential in view of the potential for abuse of the contempt power. *Taylor* v. *Hayes*, 418 U.S. 488, 496, 500 (1974).[5]

Procedure Followed by Bankruptcy Judge

Appellees argue that (1) appellant's refusal to erase or surrender the tape recording constituted misconduct in violation of 11 U.S.C. § 69(a)(2) and that summary dispo-

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[4] See also *In Re Oliver*, 333 U.S. 257, 275 (1947) where the Court held that under the "narrow exception to [the] due process requirements", it must appear, *inter alia*, that "immediate punishment is essential to prevent 'demoralization of the court's authority' before the public".

[5] See also the American Bar Association Standards relating to The Function of a Trial Judge, which sets forth in Part VII standards on use of the contempt power. In § 7.1, the Standards recognize the inherent power of a trial judge to "cite and, if necessary, punish summarily anyone who, in his presence in open court, obstructs the course of criminal proceedings". The Standards then recommend procedures for admonition, warning, and notice, including § 7.4, which reads:

> 7.4 Notice of charges and opportunity to be heard.
>
> Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

This section and the accompanying commentary were quoted with approval in *Taylor* v. *Hayes*, 418 U.S. at 499, n. 8.

sition was proper through the $250 fine; (2) when appellant refused to pay the fine the punishment "already imposed was not strong enough and a higher one was called for", and the matter accordingly was certified to the district judge pursuant to 920(a)(4); and (3) if the bankruptcy judge did not afford appellant sufficient procedural safeguards, any defect was cured by the trial in the district court.

While appellant's refusal to erase or surrender the tape recording may have been a violation of § 69(a)(1), it was not misbehavior obstructing the hearing in violation of § 69(a)(2), permitting summary punishment. The tape recording did not disrupt the proceedings. The bankruptcy judge testified at the trial in district court that he was unaware of the taping until it was brought to his attention near the end of he proceedings. Neither the taping itself nor appellant's refusal to erase or turn over the tape recording presented any imminent threat to the administration of justice. *In Re Little, supra*; compare *In Re Gordon*, 592 F.2d 1215 (1st Cir. 1979) (appellant's immoderate and irrelevant oration materially obstructed progress of hearing). The substantive purpose of the hearing had been fulfilled; a new hearing date was about to be set when the judge became aware of the recording and issued his orders. The proceeding was not obstructed in a way which required summary action.

Appellant was taken from the bankruptcy courtroom briefly in the custody of the United States marshals. This pause between the order and the imposition of the $250 fine was not sufficient to give appellant notice of the charge and a reasonable opportunity to defend. Bankruptcy Rule 920(a)(2) requires that the notice be in writing and state the time and place of hearing, allow reasonable time for the preparation of the defense, and state the essential facts constituting the contempt charged and whether the contempt is civil or criminal.

The proper approach, at least in this situation where the rule as to tape recordings had not been clearly spelled out in advance, would have been to warn appellant that refusing to obey the bankruptcy judge's order was contemptuous conduct. Appellant was appearing *pro se*. He believed and still maintains that his conduct in recording the bankruptcy proceeding is not prohibited.[6] He may have been unaware of the consequences of refusing to obey the judge's order. After the warning was given, written notice should have been given as prescribed by Rule 920(a)(2). At the hearing appellant would have been allowed to present his defense and factors that might mitigate the punishment. His good faith belief that the tape recording was not prohibited by the Bankruptcy rules and the absence of any notice that it was forbidden would have been relevant in determining the proper punishment.

The contempt conviction must be vacated because the statutorily prescribed procedure was not followed in summarily punishing appellant for refusing to obey the bankruptcy judge's order to erase or turn over the unauthorized tape recording. The failure to follow the procedure set forth in Bankruptcy Rule 920 in the initial finding of contempt and the imposition of the $250 fine affected all subsequent proceedings. Had the proper notice been given and a hearing held the subsequent proceedings might have been unnecessary. Furthermore, the contempt tried before the district court consisted not just of appellant's refusal to obey the order to surrender or erase the tape, but included

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[6] In the courts of the Commonwealth parties who represent themselves or attorneys who represent a party are apparently allowed to tape record hearings of their own cases for their own use if the proper functioning of the court is not affected. Circular letter No. 1 of the Office of Court Administration, General Court of Justice, Commonwealth of Puerto Rico (July 23, 1975). Bankruptcy Rule 511 does not explicitly prohibit a party from tape recording a proceeding. No sign of such a prohibition was visible in the bankruptcy courtroom.

appellant's subsequent stated refusal to pay the fine. As we have concluded the fine was improperly imposed, appellant was not required to pay it. The jury's finding of contempt may have been influenced by this latter action, and therefore we cannot find that the defects in the initial proceedings were cured by the trial in district court.

Having reached this conclusion, it is unnecessary to consider the remaining 12 alleged errors urged by appellant. We do note, however, that we find no merit in appellant's contention that the trial judge was biased and prejudiced against appellant. Nor is there merit in his contention that appellant was "incredibly harassed" by the Government and the court. We agree with the Government that the district judge was fair, helpful, and patient with appellant, taking into account that he was appearing *pro se.* Moreover, appellant failed to take advantage of his stand-by counsel as the court properly suggested on a number of occasions.

Likewise, we find no merit in the contention that appellant's conviction by the jury was made possible by the "cavalier treatment" of the district judge. Rather the evidence of appellant's own conduct throughout these protracted proceedings and his own trial tactics could very well have been responsible for the guilty verdict.

Conclusion

By reason of the failure of the bankruptcy judge to follow the procedure prescribed by Bankruptcy Rule 920, we conclude that it is necessary to vacate the judgment of conviction and remand to the district court for further proceedings consistent with this opinion. The district court may conclude that no further proceedings are warranted or may remand to the bankruptcy court for proceedings pursuant to Rule 920(a)(2).

In addition to the provisions quoted supra, Rule 920 (a)(2) provides that, "If the contempt charged involves

disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with consent of the person charged." Appellant's brief on this appeal clearly manifests disrespect for the bankruptcy judge, as well as the trial judge. Another bankruptcy judge should accordingly preside at any hearing held pursuant to Rule 920(a)(2).

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

Appendix B

UNITED STATES COURT

OF APPEALS

FOR THE

FIRST CIRCUIT

No. 77-1331.

GONZALO FERNOS-LOPEZ,
Petitioner, Appellant,

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO, ET AL.,

Before CAMPBELL, Circuit Judge,
BOWNES, Circuit Judge, and
JAMESON, Senior District Judge*.

ORDER OF COURT

Entered: July 20, 1979

It is ordered that the petition for rehearing filed on July 13, 1979 be, and the same hereby is, denied.

By the Court:

/s/ Dana H. Gallup
Clerk.

Appendix C: United States Code, Title 11, Bankruptcy § 69. Contempts Before Referees

(a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: Provided, That a person other than a bankrupt, or, where the bankrupt is a corporation, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

(b) The referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and

to the same extent as for a contempt committed before him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of the court of bankruptcy or in the presence of the judge.

Appendix D: United States Code, Title 11 Rules of Bankruptcy Procedure Rule 920. Contempt Proceedings

(a) Contempt Committed in Proceedings Before Referee.

(1) Summary Disposition by Referee. Misbehavior prohibited by section 69(a)(2) of this title may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by Referee upon Notice and Hearing. Any other conduct prohibited by section 69(a) of this title may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on Punishment by Referee. A referee shall not order imprisonment nor impose a fine of more than $250 as punishment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) Certification to District Judge. If it appears to a referee that conduct prohibited by section 69(a) of this title may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(b) Contempt Committed in Proceedings Before District Judge.

Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(c) Right to Jury Trial.

Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF PUERTO RICO

In the Matter of

RESTAURANTE EL TAQUITO, INC. — Bankruptcy No. 76-71

Bankrupt

ORDER OF CONTEMPT

Gonzalo Fernos Lopez having misbehaved during a hearing held before the undersigned judge in bankruptcy on the 31 of January, 1977 in the above entitled proceedings in which the following incident occurred:

1. The undersigned was told by a creditor that Gonzalo Fernos Lopez was using a tape cassette recording the proceedings in the courtroom while a meeting was being held in this case.

2. Gonzalo Fernos Lopez was asked by the undersigned if he had permission from the Court to record such proceedings, to

which he stated he had no permission at all.

3. Gonzalo Fernos Lopez was Ordered to erase such recording, however, he refused to do so.

4. Marshals Rafael Pagan, Jose Miro and Carlos Baco were called and in their presence Gonzalo Fernos Lopez was asked again by the undersigned to erase the recording that he had taken, to which Order he refused to comply. Marshal Rafael Pagan was Ordered to take possession of the cassette recorder and the cassette. Mr. Gonzalo Fernos Lopez delivered the cassette recorder to the marshal, but kept the cassette which he had put in his pocket and told the marshal he was not going to deliver the cassette.

5. Marshal Rafael Pagan and Carlos Baco, accompanied Mr. Gonzalo Fernos Lopez to the Marshal's office in order to talk to him.

6. Said Gonzalo Fernos Lopez was again brought back to appear before me, and after asking again if he was willing to erase said recording, he stated he was not going to erase such recording.

And it appearing to the satisfaction of the undersigned that by reason of the foregoing, the said Gonzalo Fernos Lopez was in contempt of court, the undersign [sic] declares Gonzalo Fernos Lopez guilty of Civil and Criminal contempt to Court and imposes a fine in the amount of $250.00, in accordance with section Forty-one (2) (11 U.S.C. 69).

Done and Ordered in San Juan, Puerto Rico January 31, 1977.

/s/

Antonio I. Hernandez-Rodriguez
Bankruptcy Judge

Appendix F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

RESTAURANT EL
TAQUITO, INC. 76-71

Bankrupt

CERTIFICATE OF FACTS SHOWING CONTEMPT

IN PROCEEDINGS BEFORE BANKRUPTCY JUDGE

To the Honorable Jose V. Toledo,
Chief Judge of the United States
District of Puerto Rico

I, Antonio I. Hernandez-Rodriguez,

Bankruptcy Judge in the above entitled proceedings, Certify that: at a hearing held on January 31, 1977 at 11:00 A.M. the following incidents occurred:

1. The undersigned was told by a creditor that Gonzalo Fernos Lopez was using a tape cassette recording the proceedings in the courtroom while a meeting was being held in this case.

2. Gonzalo Fernos Lopez was asked by the undersigned if he had permission from

the Court to record such proceedings, to which he stated he had no permission at all.

3. Gonzalo Fernos Lopez was Ordered to erase such recording, however, he refused to do so.

4. Marshals Rafael Pagan, Jose Miro and Carlos Baco were called and in their presence Gonzalo Fernos Lopez was asked again by the undersigned to erase the recording that he had taken, to which Order he refused to comply. Marshal Rafael Pagan was Ordered to take possession of the cassette recorder and the cassette. Mr. Gonzalo Fernos Lopez delivered the cassette recorder to the marshal, but kept the cassette which he had put in his pocket and told the marshal he was not going to deliver the cassette.

5. Marshal Rafael Pagan and Carlos Baco, accompanied Mr. Gonzalo Fernos Lopez to the Marshal's office in order to talk to him.

6. Said Gonzalo Fernos Lopez was again brought back to appear before me, and after asking again if he was willing to erase said recording, he stated he was not going to erase such recording. The undersigned declared Gonzalo Fernos Lopez guilty of Civil and Criminal contempt of Court and imposed a fine in the amount of $250.00, in accordance with Section Forty-One (2) (11 U.S.C. 69).

7. Gonzalo Fernos Lopez stated to the undersigned he was not going to pay said fine.

WHEREFORE:

In accordance with the mentioned facts, Gonzalo Fernos Lopez has incurred repeatedly in contempt of Court, this Judge recommends that the Court issue an ORDER against Gonzalo Fernos Lopez to show

cause why he should not be held in contempt of Court for failing to obey the Orders of this Court.

Respectfully submitted,

San Juan, Puerto Rico, this 8th day of February, 1977.

/s/
Antonio I. Hernandez Rodriguez

Bankruptcy Judge

Appendix G: United States Code, Title 11 Rules of Bankruptcy Procedure Rule 511. Recording and Reporting of Proceedings.

Rule 511. Recording and Reporting of Proceedings

(a) Record of Proceedings. Whenever practicable, the court shall require a record to be made of all proceedings in bankruptcy cases. The record may be taken by sound recording or by a reporter employed on authorization of the court to take a verbatim record by shorthand or other means. The expense of making the record shall be a charge against the estate unless the court assesses the cost or a part thereof against a person who asserts a vexatious or frivolous claim or defense. The reporter or operator of a recording device shall attach his certificate to the original shorthand notes or other original records taken under this rule and promptly file them with the court for retention for at least 6 months and as long thereafter as the court directs.

(b) Transcripts of Proceedings. Upon the request of any person, including the United States, who has agreed to pay the fee therefor, or of the bankruptcy judge, the reporter or a typist shall promptly transcribe the original records of the requested parts of a proceeding and deliver the transcript, certified by him, to the person making the request. A certified copy of any transcript so made shall be promptly filed with the court by the person making the transcript. The fees for

transcripts shall be charged at rates prescribed by the court but in no event shall a separate fee be charged for the copy filed with the court pursuant to the preceding sentence. The cost of transcription shall be a charge against the estate only when approved by the court.

(c) Admissibility of Record in Evidence. When properly certified, a sound recording or a transcript of a proceeding shall be admissible evidence to establish the record thereof and shall be deemed prima facie a correct statement of the testimony taken and the proceedings had.

Appendix H: Puerto Rico Laws Annotated, Title 32 Code Civil Procedure § 1301. Use of Tape Recorders.

§ 1301. Use of Tape Recorders.

The use of tape recorders is hereby authorized in all proceedings within the purview of the Superior Court of Puerto Rico and the transcription of such recordings by typists of the same court for the purpose of reviewing proceedings of this court in any remedy before the Supreme Court of Puerto Rico, and for any other use, is likewise authorized--June 19, 1965, No. 58, p. 110, § 1, eff. June 19, 1965.

Appendix J: New Canons of Judicial Ethics of Puerto Rico, Canon XVIII

A judge should conduct judicial proceedings in an atmosphere of solemnity and respect. Photographing or filming in the courtroom during court sessions or recesses, and radio or television broadcasting of judicial proceedings detract from the dignity of the court, may distract the witness and may prevent an impartial trial; therefore, they should not be permitted. However, a judge may authorize photographing of filming during strictly ceremonial occasions.

A judge may also authorize the recording or reproduction of judicial proceedings for educational purposes, at the request of accredited universities and under the following conditions:

a) When the means of recording or reproduction do not distract the witnesses and other participants or in any manner impair the dignity of the proceedings.

b) When the parties and all witnesses have given their prior consent;

c) When the recording or reproduction thus obtained will not be exhibited or used until a final and unappealable judgment has been rendered in the proceeding. The judge shall take measures to have said recordings remain under the custody of the court until all the testimony has been presented.

The prohibitions contained in this canon shall not be applied to the official use of tape recorders or machines authorized by the Office of Court Administration or to the use of tape recorders or similar equipment by counsel for the parties.

Appendix K

COMMONWEALTH OF PUERTO RICO

GENERAL COURT OF JUSTICE

OFFICE OF COURT ADMINISTRATION

Hato Rey, Puerto Rico

No. 1 Fiscal Year 1975-76

To: Honorable Judges of the Court of First Instance

From: Administrative Director of the Courts

Matter: Authorization to parties for the use of tape recorders at the hearings of their cases before the courts.

Date: July 23, 1975

This office hereby establishes an administrative policy to the effect that in all courtrooms of the Courts of First Instance, judges shall allow attorneys who represent the parties, or parties represented in their own right, to use their own tape recorders during the hear-

ing of their cases provided that the proper functioning of the corresponding Part or the judicial duties are not affected thereby.

(s)
Ramon Negron Soto
Administrative Director of the Courts

Appendix L1: Transcript pp. 146-49
Excerpt from Cross-examination of Referee by Defendant-Petitioner

Q: If defendant asked you before hand for permission to record the proceedings, would you have granted permission?

A: I would have granted permission.

Q: And that would be on any occasion, not on any particular one? This is a hypothetical case that I as a party or defendant, as a party, would go and ask your permission that he wants to record a proceeding.

A: It is very common in the Bankruptcy Court to record proceedings. The attorneys ask for permission and we grant permission and the recording is done.

Q: But the document that you have in your hand is a denial of same request that you just said that you will grant permission. How do you explain the contradiction?

A: Because in this same petition you asked the Court on part A, you asked in which the undersigned petitioner is a party and unless the Court otherwise decides to conduct its proceedings with normality and accordingly record its proceedings on its own with the equipment installed and in service in the Bankruptcy Courtroom making the transcript of such proceedings available to all parties concerned within the statutory time limitations. That is why I answered you denied.

The recording proceedings will be recorded by the Court stating that the recording machine was in function already. That is what you were asking for.

Q: Thank you very much.

A: You are welcome.

MR. FERNOS: I would like to present this as an Exhibit.

MR. QUILES: No objection.

THE COURT: Let it be marked as an Exhibit.
(The above-mentioned document was received in evidence as Defendant's Exhibit M.)

MR. FERNOS:

Q: Now, if defendant had been a stenographer or stenotypist like the gentleman here, would you have permitted him to take shorthand or stenotype notes, recording of the proceedings?

A: You mean being a defendant at the same time taking shorthand at the same time?

Q: Suppose I have that ability. Would you oppose that if I am a party to a proceeding that I take a notebook and as the proceeding goes, I am taking notes, would you object to that?

A: Well, if you are taking those notes

for yourself, I can't object to that. You can take all the notes you want.

Q: Does the witness have any idea if the tape that was recorded that it was for the use of any purpose that was not for defendant himself alone?

A: I don't know what idea you had in relation to that tape.

Q: And what makes you presume in your former question that when I would be taking notes it won't be for myself or whoever is the party?

A: Well, sir, you know. Anybody can go to Court, you know, and take notes of the proceedings of the Court. There is no violation there.

Q: Are you familiar with the decision of the Supreme Court in that respect, a recent decision?

MR. QUILES: Objection, Your Honor.

THE COURT: Overruled.

BY MR. FERNOS:

Q: Are you familiar with the decision?

A: State to me what decision, the number of the decision.

Q: The decision of the Supreme Court, the United States --- Oklahoma Publishing Company versus District Court in and for

Oklahoma County,decided on March 7, 1977. Per curiam and the decision in synthesis says ---

MR. QUILES: Objection.

MR. FERNOS: Okay, okay.

THE COURT: Mr. Fernos, I have repeatedly advised you on bench conferences that you are to conduct yourself as Counsel of this Court while you are acting as Counsel pro se. At such time there is objection, I don't want you to make any gestures of any nature to Counsel on the opposing side. Is that clear? You will await my ruling and abide by it.

MR. FERNOS: Okay, Your Honor.

Appendix L2: Trial Transcript pp. 168-70 Excerpt from Cross-examination of Referee by Defendant-Petitioner

Q: Did the Defendant behave in any improper way besides the fact that he refused to erase it? Did he behave in any improper way?

A: Well, that was not the only time. First I asked you if you were going to erase the recording and you told me you were not. The second time I asked you if you were willing to deliver the cassette to the Marshal and you told me, you were not going to deliver the cassette.

Not only that, you put the cassette in your pocket and said that nobody would take that cassette off of you and the third one was when I asked you again if you were willing to deliver the recording and the cassette and you told my you were not and then the fourth one was when I told you that I found you in contempt of ourt and fined you $250.00 and you told me, "I am not going to pay it, do whatever you want."

Q: Do you certify that, under oath that the defendant told you "Do whatever you want to"?

A: Well, you told me, "Well, do whatever you want. What do you want me to do." You ever asked me if I was going to put a --- if I was going to allow you to go out. I remember that.

Q; You said that you repeatedly requested me to erase the cassette recording. That is what you have just stated, right?

A: Yes.

Q: And you stated, you imposed me $250.00 fine and I said, "Your Honor, I am not going to pay that fine." Now, did you consider that each refusal constituted a separate offense?

A: I would say so.

Q: Okay. Now, the witness besides being a Judge is an attorney-at-law full practice and is familiar, I suppose, with the decisions of the United States Supreme Court. Are you familiar with the case of Y-A-T-E, Yates?

A: You have to cite me. That is no way ---

Q: Yates versus United States, 225 Federal Second, 146, 9th Circuit, 1955. But the decision of the Supreme Court you will find in 354 United States 298, 1957.

MR. FERNOS: Well, this presents a problem because this book belongs to the University.

MR. QUILES: Objection, Your Honor.

THE COURT: Approach the bench.
(Counsel approached the bench.)

THE COURT: What do you have in mind by this line of questioning?

MR. FERNOS: The Yates case as quoted in that book states that ---

THE COURT: Lower your voice.

MR. FERNOS: That all of the offenses that arise on one incident constitutes one single case of contempt.

THE COURT: That is very interesting. But what does that have to do with this case?

MR. FERNOS: He just stated he considered each case separately.

THE COURT: Let us go to something else that is relevant.

Appendix L3: Trial Transcript pp. 213-19
Defendant-Petitioner's Motion
for Acquital at Conclusion
of Government's Case

MR. FERNOS: Well, Your Honor, defendant moves the Court for acquittal under rule 29 based on the fact that the prosecutor has not been able to prove his case beyond any reasonable dout [sic] and for this defendant means that the law requires that to commit an offense of criminal contempt of Court under Title 18 of the United States Code, Section 401, it must cause intermediate [sic] interruption of Court wintesses and they have not been able to prove that defendant's recording interrupted the proceedings of that day.

It is also alleged by defendant that the offense, according to the status of law, is meant to be an offense with the authority, dignity and forum of a Court and not of the particular Judge or Referee involved.

Also the fact that the Bankruptcy Court Referee imposed a fine of $250 to defendant. He was precluded to file a certificate of facts to the Chief United States District Judge because this is presented, a duplicity of charges which also involves the jurisdictional problem.

THE COURT: What is his remedy if you refuse to pay $250?

MR. FERNOS: The only reason defendant refused to pay is to preserve his rights

for appeal.

THE COURT: So what is the remedy of the Bankruptcy Judge if he orders you to do something and you refuse to do so and then he fines you $250; what does he do then?

MR. FERNOS: Well he can either order me confined to jail or set a bail for me to be on provisional freedom until the case is heard.

I mean, that is what I feel.

THE COURT: It is not what you feel, it is what the law states. I would like you to point out to me where a Bankruptcy Judge has authority to order your incarceration?

MR. FERNOS: Yes. Excuse me a minute.

(There was a brief pause taken at this point.)

MR. FERNOS: Well, first of all, the power of contempt is title 18, 401 says, "Fine or imprisonment, at the discretion of the Court or both."

THE COURT: That is of the District Court.

MR. FERNOS: Well, of the Bankruptcy ---

THE COURT: Title 18 is a title that deals with criminal cases for the District Court.

It does not deal with the power of the Bankruptcy Judge which is limited to a fine of $250.00 for contempt.

MR. FERNOS: Excuse me, Your Honor.

(There was a brief pause at this point)

MR. FERNOS: Well, Title 11, United States Code, Section 69 which would be the applicable statute says at the end that he has the power to fine the person or commit such person upon the same conditions as if the doing of the forbidden act occurred with reference to the process of the Court.

When it says the word, commit such person, it is my interpretation that commit means to imprison the person.

THE COURT: So you may be right.

MR. FERNOS: So if he has the power to put defendant in prison and he didn't exercise that power, he was precluded to file a certificate of facts to the Chief Judge of the United States District Court. That is my contention.

THE COURT: Do you have any cases to cite on that point?

MR. FERNOS: I could --- at this moment, no I don't.

THE COURT: All right.

MR. FERNOS: Now, the other point I want to raise is the fact that the cases decided have established since the case of Morrishead [sic: Morrisette] versus United States, 1952, that there must be an intention, a deliberate intention and awareness of the offense to be committed in order to be valid and this case is supposedly familiar to the Court but I don't think I will ---

THE COURT: Let me ask you. When you received, as you should be aware, if you are not, I will tell you.

In a rule 29 motion, the Court has to assume that all of the evidence presented by the Government will be looked upon by the jury in the most favorable light to the Government.

MR. FERNOS: That is correct.

THE COURT: So if the jury believes that the Bankruptcy Judge told you four times to either erase the tape or turn it over to the Marshal and you refused to do so, it certainly is valid grounds to hold that your intention was not to follow the order of the Bankruptcy Judge, number one. And secondly, if the jury believes that you had intention not to pay the fine of $250, then they could possibly also hold that you had an intention not to follow the order of the Bankruptcy Judge, could they not?

MR. FERNOS: Well, Your Honor, I just believe it would be a very restrictive presumption against the defendant because the fact that I say I am not going to pay, Your Honor, and I am not going to pay that fine, means I wanted to preserve my right to appeal and the next move would be to the Court to say well, okay, if you are not going to pay, we are going to cite you so much for provisional freedom, so much for bail or you will be on your own recognizance to be free, as he did. But I don't believe the fact that a person refuses to pay a fine unless it is final is any cause of contempt.

THE COURT: Well, your statement was at least according to the evidence presented by the Government, your fine was not, "I am not going to pay the fine because I am going to appeal this."

According to the evidence that has been presented here, it is that, "I am not going to pay the fine" in the same frame as you said, "I am not going to turn over the tape" and you put the tape inside your coat pocket.

This is a conclusion, of course, of conduct. If the jury believes it. I am not the jury, of course. But I have to assume that under a rule 29 motion. Everything would be believed by the jury that has been presented and if they believe everything presented, they certainly would have valid grounds for finding that your course of conduct was number one, intentional and number two, in violation of a valid order of the Court.

Number three, contrary to the dignity of the Court which would comply to [sic] at least one of the requirements you have stated as being essential elements of the crime of criminal contempt.

MR. FERNOS: So I would like to mention, Your Honor, the fact that the Bankruptcy Referee never questioned defendant for what reason he had to record the proceedings or asked any explanation. He just ordered to erase and that would be tanamount and hypothetical case if Your Honor, under stress of your work for a moment tells defendant to open a window and jump.

Now what would be the consequence. The decisions of the Supreme Court has [sic] stated that sometimes if a person disobeys an order which is wrong, he might be held in contempt of Court because he has other means to appeal the decision and he will comply with the order and he will appeal.

But when the nature of the order is such that to comply with the order will destroy the only evidence that defendant had at that time and at that moment when he has interest at stake in the Bankruptcy Court, he has no other alternative but to refuse to obey the order. But if the Court has asked the defendant to surrender the custody of the recording to the Court, he will have complied with it. But unfortunately that was not the case.

THE COURT: Well, I think that is a good

argument you have before the jury, if you present evidence that that was your intention. But at this point there is no such evidence of such intention and that at this point that is a defensive argument which is not to be taken into consideration in ruling on a rule 29 motion.

Appendix L4: Trial Transcript pp. 456-57
Excerpt from Direct Testimony
of Defendant-petitioner
(questioning conducted by
standby counsel)

Q: I see. Now, sir, when you were brought back from the Marshal's Office, if I remember correctly, there has been stated here that the Bankruptcy Judge ordered you to pay a fine of $250 and you said you would not, or words to that effect. Could you tell me, please, and the members of the jury, what reason did you have for answering that way?

A: Because I wanted to preserve my right to appeal and I believe that if I had paid the $250 fine, it would be mute [sic], my appeal, by the very fact that I had paid the fine. It is an admission by paying the fine that you are guilty of what you are accepting, the guilt.

Now, I at that moment thought that the Bankruptcy Court Referee would provide an alternative which I believe he has the power by law, the discretion to either send me to jail or to set bail for my provisional freedom and then we will see from then on what would happen. But he didn't do anything like that.

He just said, "give him back --- that would be decided up there before the Judge" he said, "Take--" he told the Marshal to give the tape recorder back. He said, "You can keep the cassette and you may leave." So I left and that is

the end of the incident.

Q: Did you ask before leaving, did you ask anything of the Bankruptcy Judge?

A: No. He told me things but I don't suppose I can say anything.

Q: Did you ask anything of him?

A: I don't think he was in the mood to be asked anything and I was kind of cautious not to provoke him any further.

Q: Tell me, sir, what tone of voice and in what manner, in what manner did you comport yourself during this proceeding?

A: Very calmly and I never raised my voice.

Q: I see.

A: And I addressed to him as Your Honor. But in Spanish I said, Su Senoria.

Appendix L5: Trial Transcript p. 513
Excerpt from Jury Instructions

It is charged in the certificate of facts dealing with the alleged contempt that at a hearing on January 31st, 1977, Gonzalo Fernos, the defendant in this case, did refuse in the presence of and during the said hearing before Bankruptcy Judge Antonio Hernandez Rodriguez, to erase a recording which the defendant was making on the Courtroom proceedings; that on the same occasion the defendant refused to turn over to the Court the tapes which had been made; that the defendant Gonzalo Fernos Lopez having been declared guilty of civil and criminal contempt of the Court by the Bankruptcy Judge and imposed a fine in the amount of $250 did refuse to pay the same, all of which is an alleged violation of title 11, United States Code, Section 69A-I. [sic]

Appendix L6: Trial Transcript pp. 514-15
Further Excerpt from Jury
Instructions

The law provides that a person shall not in proceedings before a Referee: 1, disobey or resist any lawful order, process or right or 2, misbehave during a hearing or so near the place thereof as to obstruct the same.

A Court of the United States has power to punish at its discretion such contempt of its authority as misbehavior of any person in the presence of or so near there to as to obstruct the administration of justice and disobedience or resistence to its lawful right, process, order, rule, decree or command.

Any act, matter or thing which any United States Court may see as a contempt may be punished as such by a Court of Bankruptcy.

The invalidity or validity of a Court order is not a defense in a criminal contempt proceeding against its disobedience. A contempt proceeding does not open for reconsideration the legal or factual basis of the order alleged to have been disobeyed.

When it has become final, disobedience cannot be justified by retrying the issues as to whether the order should have been issued in the first place.

There are four essential elements which are required to be proved in order to

establish the offense with which the defendant is charged.

First, that the order or orders were issued by the Bankruptcy Judge directed to Gonzalo Fernos Lopez. If you find as a matter of fact that the Bankruptcy Judge ordered the defendant to erase the tape recording of the proceedings and or if you find as a matter of fact that the Bankruptcy Judge ordered the defendant to turn over the tape recording of the proceedings, you are instructed as a matter of law that each of these orders or both are valid and lawful orders issued within the scope of the Bankruptcy Judge's power.

Two, this is the second element and I emphasize to you again that before you can find the defendant guilty of the crime charged, each one of these elements, you have to find that the Government has proven beyond a reasonable doubt.

I have just read to you the first element, this is the second element; that this occurred in or approximate to the presence of the Court.

Three, that the action of the defendant constituted an obstruction of the administration of justice.

Paragraph four, that the defendant knowingly and willfully refused to obey said order or orders issued by the Bankruptcy Judge.